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## **UNITED STATES v. BRYANT: THE RESULTS OF UPHOLDING WOMEN'S RIGHTS AND TRIBAL SOVEREIGNTY**

*Madalynn Martin\**

### *Introduction*

Justice Ruth Bader Ginsburg, a known women's advocate, authored a unanimous opinion that ensured the rights and dignity of Indian women were upheld.<sup>1</sup> *United States v. Bryant*, while primarily focused on the rights of Indian women, is equally as important in upholding the sovereignty of tribal courts. The Supreme Court held that, because tribal court convictions are valid under the Indian Civil Rights Act (ICRA), federal courts can use previous tribal court convictions to enhance the sentencing of the defendant as a repeat offender.<sup>2</sup> In tribal courts, there is no Sixth Amendment right to counsel. Rather, most tribal courts are governed by ICRA which offers similar guarantees. The provision of ICRA regarding the right to counsel differs from the Sixth Amendment on when indigent defendants are offered counsel. Thus, several tribal court convictions would be invalid in state or federal court because the indigent defendant was not given defense counsel pursuant to constitutional standards. These uncounseled tribal court convictions are then used in federal court to convict Indian defendants as habitual offenders. In this case, although the defendant's previous tribal court domestic violence conviction would have violated the Sixth Amendment right to counsel provision in a federal or state court, it was a valid conviction under ICRA and was able to be used to convict the defendant as a domestic violence habitual offender.<sup>3</sup> The Court's decision upheld the rights of Indian women and tribal sovereignty, and showcased the difference in the right to counsel granted to Indian indigent tribal court defendants.

This Note will analyze the Supreme Court's decision in *United States v. Bryant* and offer examples of various applications by both federal and state courts. Additionally, this Note will discuss the difficulties faced by tribal courts seeking to maintain autonomy over crimes committed in Indian

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1. *United States v. Bryant*, 136 S. Ct. 1954, 1958 (2016).

2. *Id.*

3. *Id.* at 1958–59.

Country and the additional protections put in place for Indian women experiencing domestic violence. Part I will address the relevant law applicable to *United States v. Bryant* at the time of the decision. Part II will discuss the procedural history of *Bryant* in the Ninth Circuit, as well as the circuit split it created with the Eighth and Tenth Circuit. Part III will delve into the Supreme Court's decision and Justice Thomas' concurrence. Part IV will highlight the differing applications of the *Bryant* decision in federal and state court decisions. Part V will discuss the implications of this decision, including reasons why tribal courts defer to federal courts and what other protections are in place for Indian women in tribal courts.

### *I. Relevant Law*

#### *A. Right to Assistance of Counsel*

The Sixth Amendment states that criminal defendants “have the [right to] Assistance of Counsel for [their] defence.”<sup>4</sup> Specifically, the Sixth Amendment requires appointment of counsel for indigent defendants anytime a sentence of imprisonment is imposed.<sup>5</sup> The right to have counsel appointed for indigent defendants was not a requirement for states to provide until 1963, when the right to appointed counsel was held to be “fundamental and essential to a fair trial” in *Gideon v. Wainwright*.<sup>6</sup> The right to counsel attaches at any “critical stage” of the criminal proceeding, which in federal court means the right attaches at a defendant's arraignment.<sup>7</sup> Further, in 1972, the Supreme Court specified that the right to counsel must be afforded to any indigent defendant charged with any offense that is punishable by a term of imprisonment.<sup>8</sup> Thus, states must provide indigent defendants with counsel if they are being tried for a crime that includes the possibility of incarceration.

Because the U.S. legal system is based upon the policy that everyone is innocent until proven guilty, this Sixth Amendment mandate ensures defendants who cannot afford counsel are still given a fair shot at maintaining that innocence.<sup>9</sup> In *Powell v. Alabama*, the Supreme Court stated that even a smart man “[w]ithout [the assistance of counsel], though

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4. U.S. CONST. amend. VI.

5. See *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963).

6. *Id.* at 342.

7. See *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970).

8. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

9. Heather Baxter, *Gideon's Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 381.

he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”<sup>10</sup> This case reflects the view of a majority of Americans today who believe that “the quality of justice a person receives should not be determined by how much money he or she has.”<sup>11</sup> The Sixth Amendment right to counsel remains a fundamental rule in our criminal justice system since its establishment in *Gideon v. Wainwright*.

Although providing indigent defendants the assistance of counsel is required by the U.S. Constitution and is a driving ideal in America today, the logistics of providing defendants with this service has its challenges. Immediately after the Supreme Court decision to require states to provide counsel to indigent defendants, states struggled to implement this mandate and it has continued to create more issues within the criminal justice system.<sup>12</sup> Specifically, government funding for public defenders is shockingly low, and any attempts to increase funding are often met with political resistance.<sup>13</sup> These public defenders are also required to handle more cases than an effective assistance claim would allow.<sup>14</sup> A 2017 study showed public defenders in Rhode Island should handle only about thirty-six percent of their current caseload to provide reasonably effective assistance of counsel.<sup>15</sup> More than fifty years after the monumental *Gideon v. Wainwright* decision requiring states to provide counsel for indigent defendants, the government still struggles to find the funding to guarantee a fair trial under this constitutional mandate.

*B. The 1968 Indian Civil Rights Act and the 2010 Tribal Law and Order Act*

While the United States Supreme Court has stressed the importance of the Sixth Amendment’s right to counsel, this constitutional ideal is not encompassed in tribal laws. In 1896, the Supreme Court held that tribal governments were not bound by the limitations of the U.S. Constitution.<sup>16</sup> The Court pointed out that “the Indian nations ha[ve] always been

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10. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

11. *Baxter*, *supra* note 9.

12. *Id.* at 348.

13. Robert E. Toone, *The Absence of Agency in Indigent Defense*, 52 AM. CRIM. L. REV. 25, 53–54 (2015).

14. *Baxter*, *supra* note 9, at 355–57.

15. ABA & NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *THE RHODE ISLAND PROJECT: A STUDY OF THE RHODE ISLAND PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS* 7 (2017).

16. *See Talton v. Mayes*, 163 U.S. 376 (1896).

considered as distinct, independent political communities . . . .”<sup>17</sup> Additionally, the Constitution specifically states treaties already made with tribes are the “supreme law of the land.”<sup>18</sup> In response to this holding, the Indian Civil Rights Act (ICRA) was fashioned in 1968 to give citizens under tribal jurisdiction the same or similar rights guaranteed in the Bill of Rights of the United States Constitution.<sup>19</sup> Thus, unlike federal or state courts, tribal courts are constrained by ICRA and not the U.S. Constitution.<sup>20</sup> ICRA received mixed reviews from tribes.<sup>21</sup> While some tribes have incorporated ICRA entirely into their tribal constitutions, ICRA has not been transferred into many tribal constitutions, and others have chosen to adapt ICRA provisions through the tribe’s own cultural lens.<sup>22</sup> The reason ICRA has not been fully implemented is because ICRA is seen by some as an attack on traditional culture and meant to force tribes to assimilate to western legal norms.<sup>23</sup>

In 2010, President Obama signed into law the Tribal Law and Order Act (TLOA), which amended ICRA and reformed the tribal criminal justice system.<sup>24</sup> The purpose of TLOA was “to clarify governmental responsibilities regarding crimes in Indian Country; increase and improve collaboration among jurisdictions; support tribal self-governance and jurisdiction; . . . [and] combat crimes such as domestic violence [and] sexual assault . . . .”<sup>25</sup> Under TLOA, tribal courts now have the ability to impose felony-level offenses, which include “sentences of up to three years per count and up to nine years per case . . . .”<sup>26</sup> Before TLOA, tribal courts could only sentence defendants up to one year imprisonment.<sup>27</sup> Like ICRA, many tribes have yet to incorporate TLOA into their criminal codes.<sup>28</sup> In a

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17. *Id.* at 383 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)).

18. *Id.*

19. Casey Douma, *40th Anniversary of the Indian Civil Rights Act: Finding a Way Back to Indigenous Justice*, FED. LAW., Mar./Apr. 2008, at 34, 34.

20. *Id.*

21. *Id.*

22. *Id.* at 35.

23. *Id.* at 34.

24. Christopher B. Chaney, *The Promise of the Tribal Law and Order Act*, FED. LAW., Mar./Apr. 2011, at 44, 44.

25. MICHELLE RIVARD PARKS, TRIBAL JUDICIAL INST., TRIBAL LAW AND ORDER ACT: ENHANCED SENTENCING AUTHORITY 2 (2015).

26. Chaney, *supra* note 24, at 46.

27. *Id.*

28. See Seth J. Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. REV. DISCOURSE 88, 94 (2013).

2012 report on TLOA, only sixty-four percent of selected tribes implemented about half the provisions necessary for enhanced sentencing and had trouble implementing the rest.<sup>29</sup> Thus, for many tribes, the earlier ICRA provisions are still governing law.

At first glance, it appears the provisions of ICRA and the Bill of Rights are coextensive, but several provisions, including the right to counsel, are slightly different. The ICRA provision regarding the right to counsel states that in “a criminal proceeding in which an Indian tribe . . . imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall . . . at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney . . . .”<sup>30</sup> Even though ICRA is recognized as a similar, modified version of the Bill of Rights, there is no right to appointed counsel for indigent defendants in tribal court if the sentence imposed is less than one year.<sup>31</sup> Thus, the ICRA provision about the right to counsel is not equivalent to the Sixth Amendment right because the Court has interpreted the constitutional right to attach anytime a sentence of imprisonment could be imposed.

### *C. Domestic Assault Habitual Offender Statute*

In *United States v. Bryant*, the defendant was charged in federal court with being a domestic assault habitual offender.<sup>32</sup> Habitual offenders, or those who have been previously charged with domestic assault, are given harsher punishment than first- or second-time offenses in an attempt to combat recidivism for sexual offenders.<sup>33</sup> The domestic assault habitual offender statute, referred to as § 117(a), includes

[a]ny person who commits a domestic assault within . . . Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction[.]

. . . assault . . . against a spouse or intimate partner . . . .<sup>34</sup>

The punishment for a domestic assault habitual offender is a sentence of imprisonment for up to five years unless the domestic assault includes

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29. *Id.* at 99.

30. 25 U.S.C. § 1302(c) (2012).

31. *Id.*

32. *United States v. Bryant*, 136 S. Ct. 1954, 1963 (2016).

33. 18 U.S.C. § 117(a) (2018).

34. *Id.*

substantial bodily injury, then the offender is potentially subject to a ten-year sentence.<sup>35</sup> This statute was created by the passage of the 2005 Violence Against Women Act targeting serial domestic abuse offenders because of a statistically high recidivism rate among domestic abusers.<sup>36</sup> In the creation of this habitual offender statute, lawmakers specifically included the ability to use Indian tribal court proceedings for the predicate offense.<sup>37</sup> Before this domestic assault habitual offender statute, abusers in Indian Country could not be tried in federal court unless the abuse resulted in serious bodily injury or death.<sup>38</sup> Additionally, tribal courts could not punish repeat abusers to sentences above one-year incarceration prior to the enactment of the 2010 TLOA.<sup>39</sup> A one year sentence is considered “insufficient to deter repeated and escalating abuse.”<sup>40</sup> Although advanced punishment is now available for tribes under TLOA, many have yet to adopt TLOA and still rely on the Federal Government and § 117(a) to convict defendants with a lengthier sentence.<sup>41</sup>

#### *D. Enhanced Sentencing and Invalid Prior Convictions*

The use of prior convictions to enhance sentencing raised concerns; specifically, whether the prior convictions used are valid and whether the defendant is being punished for the prior convictions. In *Burgett v. Texas*, the Supreme Court held when a prior conviction is obtained in violation of the Sixth Amendment’s right to counsel, that conviction cannot be used to support guilt or enhance punishment for a later offense.<sup>42</sup> The use of the prior conviction would only create “anew” a Sixth Amendment violation in any subsequent convictions of the defendant.<sup>43</sup> Thus, any invalid conviction cannot be used to punish habitual offenders. Additionally, in *Nichols v. United States*, the Supreme Court specified that a sentence enhancement due to a prior conviction is not punishment for the prior conviction, but it is a punishment only for the current conviction being charged.<sup>44</sup> In *Nichols*, the defendant’s guilty plea to a DUI offense was used to enhance his

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35. *Id.*

36. NAT’L CONG. OF AMERICAN INDIANS, VAWA 2013’S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 15 n.xiv (2018).

37. *Bryant*, 136 S. Ct. at 1961.

38. *Id.*

39. *Id.*

40. *Id.*

41. See Fortin, *supra* note 28, at 90–91.

42. *Burgett v. Texas*, 389 U.S. 109, 115 (1967).

43. *Id.*

44. *Nichols v. United States*, 511 U.S. 738, 747 (1994).

sentencing for a later offense.<sup>45</sup> Because the DUI offense was a misdemeanor subject to a fine—and not a term of imprisonment—the defendant did not have a constitutional right to counsel for that trial.<sup>46</sup> While this conviction was uncounseled, the conviction was not obtained in violation of the Sixth Amendment.<sup>47</sup> Accordingly, the Court held that the uncounseled prior conviction may be used to enhance sentencing.<sup>48</sup> Using valid previous convictions to enhance punishment in sentencing is not punishment for past convictions.<sup>49</sup> Indeed, “100% of the punishment is for the offense of the conviction. None is for the prior convictions or the defendant's ‘status as a recidivist.’”<sup>50</sup> Thus, a valid prior conviction, whether counseled or not, is necessary to enhance sentencing for the current offense.<sup>51</sup>

#### *E. Doctrine of Comity*

To be able to use tribal court convictions, courts refer to the doctrine of comity. Comity “is a balancing act between recognizing the legislative, executive and judicial acts of other nations and the rights of citizens of the recognizing countries.”<sup>52</sup> It is “based on the notion of respect for the ability of another nation to govern its own affairs and to regulate events there.”<sup>53</sup> For Indian tribes, comity “has been chiefly concerned with ensuring tribal court remedies are exhausted before federal courts become involved.”<sup>54</sup> Further, the doctrine of comity reasons that courts should “as a matter of discretion rather than obligation defer to the assertion of jurisdiction or give effect to the judgments of other states or sovereigns out of mutual respect, and for the purpose of furthering the orderly administration of justice.”<sup>55</sup> Comity is also concerned with prior tribal court convictions since tribes are

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45. *Id.* at 740.

46. *Id.* at 743 (citing *Scott v. Illinois*, 440 U.S. 367 (1979)).

47. *Id.* at 746.

48. *Id.* at 746–47.

49. *Id.* at 747.

50. *United States v. Rodriguez*, 553 U.S. 377, 386 (2008).

51. *Id.*

52. Samuel D. Newton, Note, *Reliability, That Should Be the Question: The Constitutionality of Using Uncounseled Tribal Court Convictions in Subsequent Federal Trials After Ant, Cavanaugh, and Shavanaux*, 36 AM. INDIAN L. REV. 489, 501 (2011–2012).

53. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.07(2)(a) (Nell Jessup Newton et al. eds., 2017).

54. Newton, *supra* note 52.

55. *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 236 Wis. 2d 384, 405 (2000).



considered separate sovereigns.<sup>56</sup> Respecting and recognizing tribal court convictions helps prevent “endless relitigation of issues.”<sup>57</sup> The doctrine of comity allows for courts to have deferential preference toward recognizing prior tribal court convictions when relying on them in subsequent proceedings.

## *II. Procedural and Factual History*

The facts in *United States v. Bryant* exemplify the problem of domestic violence in Indian Country. Michael Bryant Jr. is an enrolled member of the Northern Cheyenne Tribe and once resided on the reservation.<sup>58</sup> During that time, Mr. Bryant had a record of over one hundred tribal court convictions, and at least five of those convictions were guilty pleas for domestic abuse.<sup>59</sup> For each of his domestic violence cases, the tribal court sentenced Mr. Bryant to terms of imprisonment of less than one year.<sup>60</sup> Under ICRA, the Northern Cheyenne Tribal Court was not required to appoint Mr. Bryant counsel during his domestic violence convictions because the terms of imprisonment were less than one year.<sup>61</sup> In 2011, Mr. Bryant was once again arrested within tribal jurisdiction for assaulting two different women.<sup>62</sup>

This time, Mr. Bryant’s case was not brought to tribal court, but instead to federal district court where he was indicted by a grand jury as a domestic assault habitual offender under § 117(a).<sup>63</sup> The court used Mr. Bryant’s five previous tribal court domestic violence convictions to charge him under § 117(a).<sup>64</sup> Finally receiving assistance of counsel, Mr. Bryant motioned the court to dismiss the habitual offender charge.<sup>65</sup> He argued that using the tribal court convictions as a predicate offense violated his Sixth Amendment right to counsel because his uncounseled tribal court convictions would have violated the Sixth Amendment right to counsel if brought in state or federal court.<sup>66</sup> The trial court denied the motion to

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56. Newton, *supra* note 52.

57. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 53, § 7.07(2)(a).

58. *United States v. Bryant*, 136 S. Ct. 1954, 1963 (2016).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1963–64.

64. *Id.*

65. *Id.* at 1964.

66. *Id.*

dismiss the habitual offender charge, and Mr. Bryant consequently pleaded guilty, reserving the right to appeal the issue.<sup>67</sup> Mr. Bryant was then sentenced as a habitual offender, and, with the help of counsel, appealed the district court's ruling on the motion to dismiss to the Ninth Circuit.<sup>68</sup>

On appeal, the Ninth Circuit reversed the decision of the district court, relying on its previous decision in *United States v. Ant*.<sup>69</sup> In *Ant*, the defendant wanted to suppress a prior guilty plea made in tribal court arising out of the same offense in federal court.<sup>70</sup> The court focused on the reliability of the previous tribal court conviction.<sup>71</sup> In *Ant*, the court decided the lack of assistance of counsel made the previous guilty plea unreliable to be used in federal courts.<sup>72</sup> Using the precedent from *Ant*, the Ninth Circuit found the admissibility of the tribal court convictions valid only if Mr. Bryant was guaranteed the right to counsel coextensive with the Sixth Amendment.<sup>73</sup> The court reasoned that Mr. Bryant's prior convictions, if obtained in federal or state court, would have violated the Sixth Amendment because he was not offered counsel.<sup>74</sup> As such, the Ninth Circuit held the government may not rely on Mr. Bryant's tribal court convictions to charge him as a habitual offender because the convictions, while valid under ICRA, violate the right to counsel guaranteed by the Sixth Amendment.<sup>75</sup> This decision created a circuit split between the Ninth Circuit and the Eighth and Tenth Circuits.

The Eighth Circuit in *United States v. Cavanaugh* was "persuaded . . . that the predicate convictions, valid at their inception, and not alleged to be otherwise unreliable, may be used to prove the elements of § 117."<sup>76</sup> In this case, the defendant was charged in federal court with domestic violence by a habitual offender under § 117(a).<sup>77</sup> The defendant's prior convictions in tribal court were without the assistance of counsel and would have been in violation of the Sixth Amendment had they been in state or federal court because they resulted in incarceration.<sup>78</sup> The district court had dismissed the

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67. *Id.*

68. *Id.*

69. *United States v. Bryant*, 769 F.3d 671, 673 (9th Cir. 2014).

70. *United States v. Ant*, 882 F.2d 1389, 1390 (9th Cir. 1989).

71. Newton, *supra* note 52, at 519.

72. *Ant*, 882 F.2d at 1395.

73. *Bryant*, 769 F.3d at 677.

74. *Id.* at 673.

75. *Id.*

76. 643 F.3d 592, 594 (8th Cir. 2011).

77. *Id.* at 593.

78. *Id.* at 593–94.

habitual offender claims below because, although the tribal court convictions were valid, they would “give rise anew to a Sixth Amendment violation by imposing federal punishment.”<sup>79</sup> The Eighth Circuit reversed the lower court’s holding.<sup>80</sup> The appellate court reasoned that the use of the uncounseled tribal court conviction did not violate any Sixth Amendment guarantees because the punishment imposed in the current case is for the current offense only, not for the prior conviction.<sup>81</sup> When contemplating whether the tribal court conviction was able to be used the Eighth Circuit noted that if it did make the decision to not uphold the validity of the tribal court conviction, this decision would not “restrict a tribe’s own use of that conviction; it would simply restrict a federal court’s ability to impose additional punishment at a later date in reliance on that earlier conviction.”<sup>82</sup> Because the Sixth Amendment is not extended to tribal courts, the Eighth Circuit concluded that the defendant’s conviction was able to be used in subsequent federal proceedings.<sup>83</sup> The court further buttressed this opinion by citing the doctrine of comity, acknowledging that deference must be given to the tribal court conviction out of respect for the sovereignty of tribal courts.<sup>84</sup>

The Tenth Circuit in *United States v. Shavanaux* upheld the use of the defendant’s prior uncounseled tribal court conviction in his federal court conviction to classify him as a domestic assault habitual offender under § 117(a).<sup>85</sup> The court concluded that the defendant’s tribal court conviction was not—and could not—be a violation of the Sixth Amendment because the Bill of Rights does not apply to tribal jurisdiction.<sup>86</sup> Moreover, a valid conviction cannot violate “anew” the Sixth Amendment in subsequent federal court proceedings.<sup>87</sup> “[T]he practice of failing to fully recognize convictions from individual tribal courts also risks imposing inappropriately sweeping standards upon diverse tribal governments, institutions and cultures,” which undermines ICRA’s objective of allowing tribes to adopt “their own tribal court[s] and criminal justice system[s].”<sup>88</sup> Further, the

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79. *Id.* at 595.

80. *Id.* at 603–04.

81. *Id.* at 599.

82. *Id.* at 605.

83. *Id.* at 603–04.

84. *Id.* at 605.

85. 647 F.3d 993, 1000 (10th Cir. 2011).

86. *Id.* at 999.

87. *Id.* at 998.

88. *Id.* at 1000 (citation omitted).

Tenth Circuit reasoned that upholding tribal convictions is similar to upholding the validity of using prior foreign offenses that do not comport with the Constitution.<sup>89</sup> Under the principle of comity, the Tenth Circuit allowed the use of tribal court convictions in federal district court to enhance sentencing.<sup>90</sup>

Both the Eighth Circuit and the Tenth Circuit based their holdings in *Cavanaugh* and *Shavanaux* on the notion that, because the convictions were brought in tribal court, and the Sixth Amendment does not apply, the convictions are valid if properly conducted under ICRA.<sup>91</sup> Alternatively, the Ninth Circuit based its holding on the fact that the conviction would have been unconstitutional if brought in federal court and thus raised reliability issues.<sup>92</sup> While there are Sixth Amendment concerns of reliability in *Bryant*, the Supreme Court reversed the Ninth Circuit decision, and instead chose to apply the Eighth and Tenth Circuit's comity approach to prior tribal court convictions.<sup>93</sup>

### III. United States v. Bryant

#### A. Issue and Holding

The Ninth Circuit decision was granted certiorari by the Supreme Court to answer the question: "Is it permissible to use uncounseled tribal-court convictions—obtained in full compliance with ICRA—to establish the prior-crimes predicate of § 117(a)?"<sup>94</sup> The Court held that it was permissible to use the defendant's uncounseled tribal court convictions as a predicate offense for an enhanced sentence because these convictions did not violate ICRA or the Sixth Amendment.<sup>95</sup>

#### B. Reasoning

Justice Ginsburg's opinion starts by emphasizing the importance of this case for Native American women because, "compared to all other groups in the United States," Native American women "experience the highest rates

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89. *Id.*

90. *Id.* at 1001.

91. *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011); *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011).

92. *United States v. Bryant*, 769 F.3d 671 (9th Cir. 2014).

93. *United States v. Bryant*, 136 S. Ct. 1954, 1964 (2016).

94. *Id.* at 1962.

95. *Id.* at 1958–59.

of domestic violence.”<sup>96</sup> Specifically, § 117(a), the punishment provision for domestic violence habitual offenders, is important for Native American women because it helps deter and prevent recidivism of abusers in Indian Country.<sup>97</sup> The facts in *United States v. Bryant* exemplify § 117(a)’s solution for recidivism because the defendant was brought into federal court as a habitual offender after multiple convictions for domestic assault in tribal court.<sup>98</sup>

The Court relied on *Nichols v. United States* in its analysis and decision.<sup>99</sup> The precedent set in *Nichols* provides that a valid conviction in any court can be used as a predicate offense for § 117(a).<sup>100</sup> The defendant, Mr. Bryant, unsuccessfully argued that his case is distinctive from the defendant in *Nichols v. United States*, because he was actually imprisoned for his uncounseled tribal court convictions, unlike the defendant in *Nichols* who received a fine.<sup>101</sup> Under this argument, the tribal court conviction would be a violation of the Sixth Amendment if Mr. Bryant had been tried and convicted in state or federal court and, thus, it creates “anew” a Sixth Amendment violation in federal courts.<sup>102</sup> Mr. Bryant conceded that all of his previous tribal court convictions were valid under ICRA, but still maintained that they could not be used as a predicate offense under § 117(a).<sup>103</sup> The Court held the uncounseled tribal court conviction could be used regardless of whether the previous conviction would violate the rules of the present court.<sup>104</sup> Pursuant to the conclusion in *Nichols* that repeat offender laws do not punish the previous crime, the previous conviction need only be a valid state, federal, or tribal conviction to be used under § 117(a).<sup>105</sup>

The Court further relied on the doctrine of comity when discussing the reliability of tribal court convictions governed by ICRA.<sup>106</sup> Although lack of counsel when subject to a term of imprisonment would violate the Sixth Amendment, the Sixth Amendment does not apply to tribal courts.<sup>107</sup>

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96. *Id.* at 1959 (quoting 151st CONG. REC. 9061 (2005) (remarks of Sen. McCain)).

97. *Id.* at 1960.

98. *Id.*

99. *Id.* at 1963.

100. *Id.*

101. *Id.*

102. *Id.* at 1962.

103. *Id.* at 1964.

104. *Id.*

105. *Id.*

106. *Id.* at 1966.

107. *Id.* at 1964.

Rather, ICRA is the governing law to control the validity of the tribal court conviction. As such, the holding in *Burgett*, that using a prior conviction that violates the Sixth Amendment would create “anew” another Sixth Amendment violation, is not applicable to Mr. Bryant because there was no initial violation.<sup>108</sup> Accordingly, the tribal court predicate offense cannot create “anew” a Sixth Amendment violation if the prior conviction is governed by ICRA and not the Sixth Amendment.<sup>109</sup> Additionally, the Court acknowledged there is no reason to suppose that tribal court convictions are less reliable or cannot be used as a predicate offense in federal court if they result in imprisonment rather than a fine.<sup>110</sup>

In addition to the Sixth Amendment claim, Mr. Bryant invoked a Fifth Amendment due process claim.<sup>111</sup> The due process claim was an attempt to preclude using any tribal court conviction as a predicate offense in federal court because using that conviction does not afford the same due process of law that the Constitution requires.<sup>112</sup> This argument was rejected by the Court because ICRA guarantees defendants due process of law, even if the ICRA provision is different than the corresponding constitutional guarantee.<sup>113</sup> The Court supported this by reasoning that ICRA additionally provides procedural safeguards by allowing defendants to appeal the decisions of the tribal court in a federal habeas corpus proceeding, which offers the defendant adequate due process of the law.<sup>114</sup>

### *C. Justice Thomas’ Concurrence*

Justice Thomas joined the majority only because precedent cases dictate this holding.<sup>115</sup> But, Justice Thomas disagreed with the decision of the Court to uphold the use of the tribal court conviction as a prior offense in a subsequent trial, because he saw no constitutional backing for the previous decisions that gave rise to the current decision.<sup>116</sup> Justice Thomas outlined the three premises upon which this holding relied.<sup>117</sup> First, the holding relied on the fact that the Sixth Amendment restricts any use of prior convictions that are invalid because they were not obtained pursuant to the

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108. *Id.* at 1966.

109. *Id.*

110. *Id.* at 1965.

111. *Id.* at 1966.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1967 (Thomas, concurring).

116. *Id.*

117. *Id.*

Sixth Amendment.<sup>118</sup> Second, the holding also was grounded on the fact that tribes are sovereign and are not bound to the terms of the U.S. Constitution.<sup>119</sup> Third, the holding also focused on Congress's power to "punish assaults that tribal members commit against each other on Indian land."<sup>120</sup>

Regarding the first premise, Justice Thomas asked the Court to reconsider *Burgett*'s bar on using convictions in violation of the Sixth Amendment for predicate offenses because they would give rise "anew" to a Sixth Amendment violation in the current case.<sup>121</sup> To Justice Thomas, the text of the Sixth Amendment should only guarantee the right to assistance of counsel for the current proceeding and thus, be able to use invalid prior convictions as predicate offenses.<sup>122</sup> For the second and third premise, Justice Thomas commented on the contradiction that tribes are not constrained to follow the Constitution because they are sovereign, but Mr. Bryant is able to be federally prosecuted for a crime that should only be able to be brought in tribal court because Congress is endowed with "power over all aspects of tribal sovereignty."<sup>123</sup> Thus, even though tribes are allowed to set up their court systems without regard for the enumerated constitutional provisions, Congress can limit and "second guess" the ability of the tribal courts, and choose to punish certain Indian crimes in federal court.<sup>124</sup> Justice Thomas "continue[s] to doubt" whether complete tribal sovereignty or Congress' dominion over tribal court is the correct way to view tribal sovereignty, and acknowledges that the U.S. Constitution does not give any guidance to the issue.<sup>125</sup>

#### *IV. Applications*

Because tribal court convictions can apply beyond tribal jurisdiction, there are further implications from the holding in *Bryant* than main issue of Indian indigent defendants not being afforded the right to counsel. As such, it is helpful to review how different courts have applied *Bryant* in an array of circumstances. As the following cases will show, *Bryant* has been used to uphold the application of several tribal convictions beyond tribal

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118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1968.

124. *Id.*

125. *Id.*

jurisdiction. For example, the holding from *Bryant* was applied to a defendant who plead guilty to child molestation in tribal court without counsel and failed to register as a sex offender outside of tribal jurisdiction.<sup>126</sup> Additionally, it has been upheld where the defendant was given the assistance of lay counsel instead of a licensed attorney.<sup>127</sup> Further, *Bryant* has been applied where the defendant invoked a Sixth Amendment right to counsel in tribal jurisdiction, but it did not attach until the case was brought for arraignment in federal court.<sup>128</sup> Finally, *Bryant* has been applied to a decision where the defendant claimed his Fifth Amendment due process right was violated at the prior tribal court conviction.<sup>129</sup>

#### A. Sex Offender Registration

A similar application of the Supreme Court's decision in *Bryant* is the Arizona Court of Appeals decision in *State v. Lopez*.<sup>130</sup> In this case, the defendant pleaded guilty—without the assistance of counsel—in tribal court to child molestation and was sentenced to less than a year imprisonment.<sup>131</sup> Thus, this was a valid tribal court conviction under ICRA. After the defendant's release, he was charged by the state for failing to register as a sex offender.<sup>132</sup> The defendant then challenged this claim as unconstitutional because it was based on an uncounseled tribal court conviction.<sup>133</sup> Initially, the state court could not use the uncounseled tribal court conviction because the court was subject to the Ninth Circuit's original holding in *United States v. Bryant*.<sup>134</sup> When the Supreme Court reversed the Ninth Circuit's holding in *Bryant*, the Arizona Court of Appeals reversed its decision.<sup>135</sup> The Arizona Court of Appeals held the tribal court conviction can show failure to register as long as the provisions of ICRA were followed in the prior conviction.<sup>136</sup>

*Bryant's* application in *State v. Lopez* is a primary example of how the decision in *Bryant* can harm a defendant that might not realize the full

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126. See discussion *infra* Section IV.A.

127. See discussion *infra* Section IV.B.

128. See discussion *infra* Section IV.C.

129. See discussion *infra* Section IV.D.

130. Nos. 2 CA-CR 2016-0076 and 2 CA-CR 2016-0122, 2017 Ariz. App. Unpub. LEXIS 1097 (Ct. App. July 27, 2017).

131. *Id.* at \*2.

132. *Id.*

133. *Id.*

134. *Id.* at \*3.

135. *Id.* at \*4.

136. *Id.* at \*6.



effect of his uncounseled guilty plea outside of tribal jurisdiction. In this case, the defendant was not offered assistance of counsel in tribal court, but he would have been offered that assistance if the case was brought in state or federal court. The defendant was not offered the same rights as those given in the jurisdiction that the conviction was then applied. While the Supreme Court has held that the doctrine of comity necessitates this result, there are consequences to indigent tribal defendants who are not offered the same rights as defendants in state or federal court.

*B. Assistance of Lay Counsel*

The Supreme Court's decision in *Bryant* was applied in reference to a defendant's claim that he had not been given proper assistance of counsel in tribal court. In *United States v. Long*, the defendant was charged in federal court with being a prohibited person in possession of a firearm, which requires a finding of a predicate offense.<sup>137</sup> The predicate offense used was the defendant's previous Rosebud tribal court conviction, which resulted in sentencing more than a year of incarceration.<sup>138</sup> According to ICRA, the defendant was given right to counsel in the tribal court because he was indigent and his sentencing was for a period greater than a year.<sup>139</sup> The Eighth Circuit reasoned "any right that Long had to appointed counsel could have come only from Rosebud tribal law."<sup>140</sup> Under Rosebud tribal law, lay counsel, instead of licensed attorneys, can be chosen to represent indigent defendants.<sup>141</sup> Rosebud tribal court did not appoint an attorney to represent the defendant; rather, he was appointed a lay person to represent him in his tribal court case.<sup>142</sup> Because *Bryant* affirmed that the Sixth Amendment does not apply to tribal courts, as long as the prior conviction was valid under Rosebud tribal law, it was also valid to use as a predicate offense.<sup>143</sup>

There are no provisions under ICRA requiring that the counsel chosen to represent the indigent defendant be effective or a licensed attorney.<sup>144</sup> Many tribal courts use lay counsel to represent indigent defendants so long as they

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137. 870 F.3d 741, 743 (8th Cir. 2017).

138. *Id.* at 745.

139. *Id.* at 747.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Fortin, *supra* note 28, at 100.

are licensed to practice in tribal court.<sup>145</sup> TLOA added a provision that requires tribes to grant defendants the right to effective assistance of counsel “at least equivalent to that guaranteed by the U.S. Constitution.”<sup>146</sup> Also under TLOA, “if the defendant is indigent, an ‘attorney,’ licensed by a jurisdiction whose standards ensure ‘competence and professional responsibility,’ must be provided at the tribe’s expense.”<sup>147</sup> Consequently, if the tribe adopts the enhanced sentencing of TLOA, then they must also adopt the guarantees of effective assistance by a licensed attorney.<sup>148</sup> While the provision is not specific as to what constitutes effective assistance, courts will likely follow the constitutional standard for effective assistance.<sup>149</sup> The defendant’s prior tribal conviction in *Long* was not governed by the new provisions of the TLOA.<sup>150</sup> Thus, lay counsel was allowed to represent the defendant in tribal court.

The TLOA provision regarding effective assistance is seen by some as further assimilating tribes into Western legal culture and that lay counsel may actually be better trained in tribal common law and understandings of tribal legal culture than licensed attorneys.<sup>151</sup> Further, many tribes are not able to incorporate TLOA because of the cost of maintaining full defense counsel for indigent defendants.<sup>152</sup> Given that not all tribes have adopted TLOA, many tribes likely have convictions similar to the prior conviction in *Long*. Thus, *Long* illustrates the potential use of prior lay counseled tribal convictions in subsequent proceedings for tribes not under TLOA.

### C. When Right to Counsel Attaches

Because of dual sovereignty, tribal courts and federal courts can bring the same or similar charge in both jurisdictions, but the Sixth Amendment right to assistance of counsel will only attach in federal court. In *United States v. Mahkimetas*, the defendant was arraigned in tribal court.<sup>153</sup> As mentioned previously, if this case was brought in federal jurisdiction, the right to counsel would attach at the defendant’s arraignment. During a tribal

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145. *Id.*

146. *Id.* at 95.

147. *Id.*

148. *Id.* at 100.

149. TRIBAL LAW & POLICY INST., TRIBAL LEGAL CODE RESOURCE: TRIBAL LAWS IMPLEMENTING TLOA ENHANCED SENTENCING AND VAWA ENHANCED JURISDICTION 71 (2016).

150. *United States v. Long*, 870 F.3d 741, 743 (8th Cir. 2017).

151. Fortin, *supra* note 28, at 100–01.

152. *Id.* at 97–99.

153. No. 17-CR-224, 2018 U.S. Dist. LEXIS 57887, at \*12 (E.D. Wis. Apr. 4, 2018).

investigation following the tribal court arraignment, the defendant asked to invoke his Sixth Amendment right to counsel.<sup>154</sup> The investigators stopped their questioning, but later a federal district court picked up the case and the same investigators again initiated questioning during travel to the federal court arraignment.<sup>155</sup> The defendant argued that his Sixth Amendment right to counsel was invoked when he asked for counsel following the tribal court arraignment.<sup>156</sup> Thus, his rights were violated when the investigators initiated questioning without counsel present because he had invoked the right after the tribal court arraignment.<sup>157</sup>

The Seventh Circuit held that there was not a Sixth Amendment violation partially because of *Bryant's* holding that the Sixth Amendment right to counsel does not apply in tribal courts.<sup>158</sup> Thus, the right to counsel did not attach at a tribal court proceeding because the tribal code did not offer the defendant the right to appointed counsel, and the defendant did not make any indication that he was going to hire counsel at his own expense.<sup>159</sup> The court reasoned that the defendant's Sixth Amendment right to counsel would only attach after the federal court arraignment.<sup>160</sup>

Given that federal courts and tribal courts are separate sovereigns and the defendant can be charged for the same crime in both court systems, the time in which the Sixth Amendment right to counsel attaches is difficult for defendants to understand. This case provides notice to tribes to caution and inform defendants of the difference in laws from tribal court to federal courts. Many defendants likely do not understand rules that are applicable to the federal court system through the Constitution are not necessarily applicable to tribes. Further, defendants need to be informed that rights invoked in tribal court will not follow them into federal court, even if it is the same or a similar charge.

#### *D. Fifth Amendment Due Process Guarantee*

The Supreme Court touched on the Fifth Amendment due process right in *Bryant*, concluding that tribal court convictions do not inherently violate due process rights because ICRA still guarantees the defendant these rights. The federal district of South Dakota similarly applied this rule in *United*

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154. *Id.* at \*2.

155. *Id.* at \*3–4.

156. *Id.* at \*12.

157. *Id.* at \*11–12.

158. *Id.* at \*14.

159. *Id.*

160. *Id.*

*States v. Gillette*.<sup>161</sup> The defendant in *Gillette* argued that his guilty plea in tribal court was a violation of his Fifth Amendment due process right.<sup>162</sup> The defendant argued that the court did not establish a factual basis for his admission of guilt and the court did not inform the defendant of the charge in court before pleading guilty.<sup>163</sup> The South Dakota court used the Supreme Court's decision in *Bryant* to reason that ICRA, not the Fifth Amendment, governs tribal court.<sup>164</sup> The provisions of ICRA guarantee defendants the due process of law.<sup>165</sup> Courts are silent as to whether this due process guarantee should be interpreted the same as the constitutional guarantee.<sup>166</sup>

As to the factual basis claim, the court reasoned due process does not require the finding of a factual basis.<sup>167</sup> Federal Rule of Criminal Procedure 11 requires the finding of a factual basis for a guilty plea.<sup>168</sup> Since ICRA only incorporates a due process rule and does not incorporate the federal rules, there was no requirement for a finding of a factual basis for guilt.<sup>169</sup> Further, the defendant claimed that he was not read his charge in court before pleading guilty, but the court found that there was a trial transcript of the defendant's attorney reading the charge to the defendant before the plea was given.<sup>170</sup> Thus, the defendant's ICRA due process right was not violated.

The South Dakota court did not decide whether the due process right of ICRA should be interpreted in the same way as the Fifth Amendment right.<sup>171</sup> While there cannot be a Fifth Amendment violation made in tribal court, courts interpret due process violations using Fifth Amendment court opinions because of the similarity of the ICRA guarantee.<sup>172</sup> It cannot be assumed that "in the limited circumstances in which federal courts now apply [ICRA], the guarantees of [ICRA] will be enforced in exactly the same way as their counterparts in the Constitution."<sup>173</sup> While the Fifth

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161. No. 3:17-CR-30122-RAL, 2018 U.S. Dist. LEXIS 47968 (D.S.D. Mar. 23, 2018).

162. *Id.* at \*11–12.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at \*14–15.

168. *Id.*

169. *Id.*

170. *Id.* at \*13.

171. *Id.* at \*14–15.

172. *Id.*

173. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 414 (6th ed. 2014).

Amendment due process of law is not applied to the tribes, a federal court could use Fifth Amendment precedent to make its decision because of its similarities with the due process guarantee of ICRA and the court's familiarity with constitutional due process. While the court in *Gillette* explicitly stated that it did not make a decision on whether to apply the due process clause of ICRA in the same manner as the Fifth Amendment, its analysis of the defendant's claim that the court did not give him notice of his charges was analyzed with Fifth Amendment due process precedent cases.<sup>174</sup> *Gillette* is an example of a court using constitutional case precedent to interpret a constitutionally similar ICRA provision.

#### *V. Implications*

As the above cases illustrate, there are various ways in which courts have applied the *Bryant* decision. All of the cases mentioned above limit the rights of the defendant. While the rights of tribal defendants are more limited than the rights given to federal or state court defendants under the Constitution, the somewhat more limited guarantees of ICRA must be upheld because tribes are sovereign. While the doctrine of comity allows for courts to interpret the reliability of other sovereign's convictions, *Bryant* supports the idea that upholding tribal court decisions is more important. The *Bryant* decision did not question ICRA's law or its guarantees of rights, but rather applied ICRA to the tribal case and did not entertain the idea that the conviction could be reopened and argued. While potentially limiting the rights of indigent defendants, ICRA is the guideline for what tribal courts must offer tribal court defendants. Thus, any ICRA-governed valid tribal court conviction will be upheld in a Constitution-governed U.S. system.

#### *A. Funding for Tribal Courts and the Implementation of the Tribal Law and Order Act*

The reason that ICRA does not guarantee defendants the right to counsel equivalent to the Constitution is predominantly due to funding.<sup>175</sup> As mentioned previously, many tribes use lay counsel because retaining full defense counsel is expensive. Moreover, many tribes have not implemented TLOA primarily because of the lack of funding to provide counsel to indigent defendants.<sup>176</sup> Resources for tribes is a top concern.<sup>177</sup> At a recent

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174. *Gillette*, 2018 U.S. Dist. LEXIS 47968.

175. Fortin, *supra* note 28, at 99.

176. *Id.*

roundtable before the Senate Committee on Indian Affairs, funding was repeatedly mentioned as the primary hindrance for tribes trying to implement TLOA.<sup>178</sup> One participant of the roundtable lamented that “[the Tribal Law and Order Act] failed to introduce the financial resources to become effective . . .” and that “[the tribe] need[s] additional, recurring funding [to provide more defense counsel].” Another participant pointed out that “[t]here is not as much money for indigent [defense] as there is for prosecution.”<sup>179</sup> With the lack of funding, many tribes cannot afford to implement TLOA’s additional rights to indigent defendants. Thus, many indigent defendants are still not offered assistance of counsel even when subject to imprisonment.

Although funding is an issue, the implementation of TLOA is a positive resolution to sovereignty issues. TLOA gives tribes the ability to stop relying on the federal government to punish recidivism and it provides guidelines for communication between the federal government and tribes. As mentioned previously, if tribes implement TLOA, they are able to punish Indian defendants for more than a year imprisonment. Consequently, TLOA allows tribal courts to enhance punishment on repeat offenders in tribal courts, rather than relying on federal courts and § 117(a) to prevent recidivism. Thus, tribes that have implemented TLOA can use their own resources to combat recidivism instead of relying on the federal system. The federal government can be selective when deciding which tribal cases to bring into the federal court system. Having the ability to punish domestic assault repeat offenders with harsher punishment allows tribes to retain more autonomy and ensure justice has been carried out in a way consistent with the traditions of the tribe. Beyond the ability to sentence repeat offenders in tribal court, TLOA also established guidelines for improved communication between tribes and the United States Attorney’s Office. This is meant to ensure that tribal cases are not being overlooked in federal court. This open communication policy helps tribes influence the conviction and punishment of Indian defendants in federal court. Thus, the implementation of TLOA is beneficial to tribal autonomy, whether the Indian defendant is being tried in federal court under § 117(a) or tribal court.

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177. See *The Tribal Law and Order Act Five Years Later: Next Steps to Improving Justice Systems in Indian Communities: Hearing Before the S. Comm. on Indian Affairs*, 114th Cong. 9–34 (2016).

178. *Id.*

179. *Id.*

Through the adoption of TLOA, Indian indigent defendants are guaranteed more rights than under the previous ICRA provisions. Although tribes are adopting the TLOA into their respective criminal codes, funding keeps many still relying on federal courts to punish recidivism for domestic violence. The problem of domestic violence towards Indian women has been the focus of many statutes, but tribes are not able to implement them because of the lack of funding. While there are many resources available to help tribes implement TLOA, there should be additional resources for Indian indigent defendants to understand how their tribal court conviction can be upheld outside of tribal jurisdiction.

*B. The Violence Against Women Act's Expansion of Jurisdiction to Non-Indians*

TLOA works with the Violence Against Women Act to deter and punish domestic assault on Indian women. Indian women experience the highest rates of domestic violence in the United States and the majority of domestic violence offenses in Indian Country are committed by non-Indians.<sup>180</sup> Under Title IX of the 2013 Violence Against Women Act, tribal courts have jurisdiction of non-Indian perpetrators that do harm to Indian victims.<sup>181</sup> Unlike Indian defendants, a non-Indian indigent defendant being tried in tribal court is entitled to bar-licensed court-appointed counsel if the defendant is exposed to a term of incarceration at any length.<sup>182</sup> This “exposed to” rule is different from the Sixth Amendment because defendants are granted assistance of counsel under the Sixth Amendment only if they are subject to actual incarceration, not merely “exposed to” a possibility of incarceration.<sup>183</sup>

Many bills have been introduced since the creation of the Violence Against Women Act to expand the types of violent crimes committed by non-Indian defendants that fall into tribal court jurisdiction, but all have yet to pass.<sup>184</sup> Expanding jurisdiction over non-Indian defendants for the purposes of deterring violence against Indian women will allow the tribal courts to control who gets punished for crimes in Indian Country without relying on the federal court system.

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180. *United States v. Bryant*, 136 S. Ct. 1954, 1959 (2016).

181. Jordan Gross, *VAWA 2013's Right to Appointed Counsel in Tribal Court Proceedings—A Rising Tide That Lifts All Boats or a Procedural Windfall for Non-Indian Defendants?*, 67 CASE W. RES. L. REV. 379, 420 (2016).

182. *Id.* at 381–82.

183. *Id.* at 382.

184. *See* H.R. 6545, 115th Cong. (2018).

The Tribal Law and Order Act and the Violence Against Women Act allow tribal courts to keep punishment within their jurisdiction rather than relying on the federal courts to punish crimes that strongly affect tribes. Tribes are able to take a strong approach toward the violence committed against Native women from both Indians and non-Indians. These two approaches differ in that the Indian indigent defendant is not guaranteed the same right to counsel as the non-Indian indigent defendant. As tribes and the federal government continue to work together to deter and punish domestic violence habitual offenders in Indian Country, the rights of the Indian indigent defendants need to be explained and understood by tribal court defense attorneys and advocates who seek to prevent injustice toward Indian defendants.

### *Conclusion*

The differences between ICRA and constitutional provisions such as the Sixth Amendment right to counsel and the usage of ICRA governed tribal court convictions to enhance punishment, exhibit the unique sovereignty issues of the tribal courts. The decision in *United States v. Bryant* upheld the sovereignty of tribal courts and their ability to continue to use ICRA to convict Indian defendants. Additionally, this decision was applied in state and federal courts to uphold tribal court convictions and rules. For example, tribal court convictions and rules apply for sex offender registration, the assistance of lay counsel, when right to counsel attaches, and Fifth Amendment due process rights. The potential implications from the decision in *United States v. Bryant* include: the doctrine of comity; funding needed to implement TLOA in order to keep enhanced punishment sentencing within the discretion of the tribal courts; the protections afforded to non-Indian defendants under the Violence Against Women Act; and the charge to tribal courts to be cautious with indigent Indian defendants and potentially create more resources for Indian defendants to get more information on their rights inside and outside of tribal jurisdiction. While upholding tribal sovereignty and the rights of Indian women, *United States v. Bryant* demonstrates the lack of protection for Indian indigent defendants in tribal court and tribes' lack of control over punishment of domestic assault habitual offenders. Tribal courts must both protect Indian women and safeguard essential rights for Indian indigent defendants. While seemingly in opposition, tribes have a great duty to protect all of their citizens, therefore, they are tasked with protecting both of these rights.